SYARIKAT C.H. CONSTRUCTION & TRADING (SUING AS A FIRM)

v.

TAN YEW LAI DEVELOPMENT SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' V.C. GEORGE J.
[COMPANIES (WINDING-UP) NO. D3-28-213 OF 1993]
6 SEPTEMBER 1993

COMPANY LAW: Winding-up petition - Oral application to amend name of petitioner - Application dismissed on the grounds that it was not properly before the Court - Subsequent formal application - Whether Court was functus officio in respect of the application.

At the hearing of the petitioners' application for the appointment of a provisional liquidator for the respondent, the respondent raised a preliminary objection to the effect that the petitioner as named in the petition was not registered with the Registrar of Businesses and that accordingly the petitioner was not entitled to file or pursue with the petition.

Counsel for the petitioner then applied orally to amend the name of the petitioner in the petition which application was dismissed with costs. The petitioner than made a formal application, by summons in chambers, to amend the name of the petitioner as set out in the petition.

Counsel for the respondent contended that the Court was *functus officio* in respect of the application in view of the fact that the earlier oral application had been dismissed with costs. Counsel for the petitioner contended that the oral application had not been properly before the Court and that accordingly the Court was perfectly entitled to hear the formal application to amend.

Held:

[1] The petitioner seeking to amend the name of the petitioner normally need not produce any material before the Court or back up the application with sworn evidence. All it need to do is to provide the Court with an explanation for the proposed amendment. It follows then that the application was dismissed not from want of material or on the merits but in effect because the application was not properly before the Court.

[2] Notwithstanding that every application has to be by a formal application, either by motion or by a summons in chambers, pursuant to rr. 5 & 7 of the Companies (Winding Up) Rules 1972, the real reason for dismissing the application had to be and was the informal manner in which it was made.

Obiter:

To the question posed by Counsel for the respondent, namely, whether if the Court had allowed the oral application to amend, the respondent would be able to apply to set aside the order, the answer is that in all probability he could not have successfully made such an application to set aside because it stood a good chance of being dismissed by the Court invoking Rule 194 of the Companies (Winding Up) Rules 1972 which provides that formal defects are not to invalidate proceedings.

[Respondent's preliminary objection over-ruled with costs].

Legislation referred to:
Business Registration Act, s. 8(1)
Companies (Winding Up) Rules 1972, rr. 5 & 7

For the applicant - K.S. Narayanan (Alex Chang Huey Wah with him); M/s. Ong Ban Chai & Co.
For the respondent - Shahul Hameed Amiruddin (M. Palanimmah with him); M/s. Durai & Associates

JUDGMENT

V.C. George J:
This is an application by summons in chambers to amend the name of the petitioner as set out in the petition by deleting the word "Syarikat" in it.

Counsel for the respondent raised a preliminary objection. He contended that the Court is *functus officio* in respect of the application in that an identical application had been made by the then Counsel for the petitioner a month earlier (on 21 July 1993) and it had been dismissed with costs.

On that 21 July 1993, what was formally before the Court were two applications by the petitioner, encl. (6) and (8), both seeking for an order that a provisional liquidator be appointed. Encl. (8) was an improved version of encl. (6) and it was Counsel"s intention to withdraw encl. (6) and it was eventually withdrawn and struck off. As to the application encl. (8), before it could be

proceeded with, Counsel for the respondent raised a preliminary objection. He referred to the results of a search in the Registry of Businesses exhibited as Exhibit No. 17 to encl. (17) and contended that there was no firm called Syarikat C.H. Construction & Trading (as the petitioner was named in the petition) registered with the Registrar of Businesses and that accordingly by s. 8 of the Business Registration Act ("the Act") the petitioner was not entitled to file or pursue with the petition and that the Court should not countenance it.

Counsel for the petitioner in effect conceded the point made but went on to explain that the word "Syarikat" was added to the name of the petitioner inadvertently and incorrectly. He showed the Court a copy of a Certificate of Registration of a Business called "C.H. Construction & Trading" which he said was the real name of the petitioner and he proceeded to purport to orally apply to have the name of the petitioner amended to read "C.H. Construction & Trading".

Counsel for the respondent opposed the oral application. It was contended that what had been stated by Counsel in support of the application had to be by way of "sworn evidence" and that the Certificate of Registration had to be properly produced and not shown to the Judge across the Bar table as was done.

I believe that it was at this stage of the proceedings that I had suggested to Counsel for the petitioner that he should seek an adjournment of the hearing of encl. (8) to have the error in the petition rectified by a formal application. However he was adamant that he be permitted to proceed with his oral application apparently because he was anxious to have encl. (8) disposed of without any delay.

I therefore adjudicated upon the oral application to amend and dismissed it with costs. Thereupon Counsel for the petitioner sought an adjournment of encl. (8) so that he could properly apply to amend the petition. The application for adjournment was refused on the ground that Counsel had failed to avail himself of the opportunity to have it adjourned. Encl. (8) was heard and had to be and was dismissed with costs on the ground that the named petitioner was not entitled to proceed with legal proceedings by s. 8(1) of the Act.

En. K.S. Narayanan who has now come in as Counsel for the petitioner contends that the oral application had not been properly before the Court and accordingly the Court is perfectly entitled to hear the formal application to amend, that is, encl. (19) now before the Court.

The objection taken on 21 July 1993 when Counsel for the petitioner sought by the oral application to have the name of the petitioner amended in effect was that it had to be formally made. What Counsel said on the point recorded in the notes of proceedings is:

> There should be sworn evidence to back what had been said from the Bar. The document shown has to be properly produced ... No material before the Court.

The petitioner seeking to amend the name of the petitioner normally need not produce any material before the Court or back up the application with sworn evidence. All it need to do (if that) is to provide the Court with an explanation for the proposed amendment. It follows then that the application was dismissed not from want of material or on the merits but in effect because the application was not properly before the Court.

I hasten to note that when the oral application to amend the petition was considered neither I nor Counsel, I suspect, had directed our minds to that which En. K.S. Narayanan has pointed out, that is that every application has to be by a formal application, either by motion or by summons in chambers pursuant to rr. 5 & 7 of the Companies (Winding Up) Rules 1972. Be that as it may, the real reason for dismissing the application has to be and is the informal manner in which it was made.

This brings me to the pertinent question posed by Counsel for the respondent: "What if the Court had allowed the oral application to amend - would I be able to apply to set aside the order?" The answer to that question is that in all probability he could not have successfully made such an application to set aside because it stood a good chance of being dismissed, by the Court invoking Rule 194 which provides that formal defects are not to invalidate proceedings. In effect Rule 194 is relied on by Counsel and/or the Court almost every time the Court hears winding-up petitions and related applications. Oral applications to amend cause papers are frequently made in the course of such proceedings and entertained and allowed. And that is as it should be because after all, the rules

are only the hand maiden of the law and not its mistress. More often than not such applications would be to cross a "t" or dot an "i". No doubt strictly speaking, in the face of rr. 5 & 7, such applications can be said to be irregular but orders made pursuant to them are save by Rule 194.

The application to have the hearing of encl. (8) adjourned to enable the petitioner to have the errors in the petition corrected by means of a formal application was refused not because the petitioner was precluded from taking out such an application but because Counsel had refused to avail himself of the opportunity given to him to have the hearing of the application encl. (8) adjourned.

As to the order staying all proceedings made on 21 July 1993, it has to be looked at in the context in which it was made - on the application of Counsel for the respondent "because admittedly the petitioner's name is that of a firm not registered". It follows that the stay order is to be understood not to preclude any attempt to rectify the admitted error in the name of the petitioner as given in the petition.

The preliminary objection is over-ruled with costs.

TIONG HUNG MING

v.

KALIMANTAN HARDWOOD SDN. BHD.

HIGH COURT, SIBU
TUAN STEVE L.K. SHIM J.
[SUIT NO. 58 OF 1991]
8 OCTOBER 1993

PRACTICE & PROCEDURE: Application for amendment of judgment - Inclusion of payment of interest - Application made under the "slip rule" - O. 20 r. 11 Rules of the High Court 1980 - Inherent jurisdiction of the Court.

The plaintiff applied that the judgment of the Court be amended or varied by including therein an order for the payment of interest at 8% p.a. from the date of judgment until it is satisfied. Counsel for the plaintiff contended that he did not ask for the inclusion of interest on the said judgment through an accidental slip or ommission on his part as he was under the impression that the judgment had provided for such interest. Counsel further relied on O. 42 r. 12 Rules of the High Court 1980 (RHC 1980) which provides for all judgment debts to carry interest at 8% p.a.

The defendant opposed the application principally on the grounds that the amendment sought by the plaintiff will necessitate in the defendant having to refile his notice of appeal and other relevant documents and thus prejudice the defendant's appeal to the Supreme Court.

Held:

[1] There was no rationale for the defendant's proposition relating to the appeal which in any event has no relevance to the merits of the plaintiff's application. In the circumstances the question of prejudice as alleged by the defendant does not arise.

[2] At the trial the Court's mind was primarily drawn to the lengthy arguments and submissions of Counsel for the parties concerned which had concentrated essentially on matters other than on interest. The judgment therefore was confined to the issues canvassed before the Court. Nevertheless had the issue of interest been raised at the time of delivery of judgment, it would have been granted. In the circumstances and having regard to O. 42 r. 12 RHC 1980 the plaintiff's application should be allowed.

[Plaintiff's application allowed with no order as to costs].